No. 15071

IN THE

United States
Court of Appeals

For the Ninth Circuit

MAUREEN GARDNER,

Appellant,

vs.

J. J. NEWBERRY CO., INC.,

Appellee.

Appeal from the United States District Court for the District of Idaho

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BRIEF OF THE APPELLEE

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BRIEF OF THE APPELLEE

STATEMENT

Appellant's contention is that in reliance upon the skill or judgment of Appellee she purchased as a companion or pet from Appellee (Referred to by Appellant as a "Five and Ten cent store," Br. p. 32), a parakeet which had been offered to the general public; that the parakeet was infected with psittacosis and therefore was not fit for the particular purpose for which it was purchased.

Appellant then relies upon Section 15 (1) of the Uniform Sales Act (Section 64-115(1) Idaho Code)

which first declares the doctrine of caveat emptor and no implied warranties, excepting only in certain cases and specifically an implied warranty for the particular purpose for which goods are purchased where such particular purpose is made known to the seller and the buyer relies upon the seller's skill or judgment; Appellant further contending that such statutory provisions change the substantive law of Idaho as it previously existed.

Appellant does not state a claim to support such contention. No particular purpose such as breeding, trained animal, laboratory use or other special purpose is alleged. There is no allegation that Appellant relied upon the skill or judgment of seller. The allegation that Appellant relied upon an implied warranty does not bring Appellant within the statutory provisions relied upon, nor within the substantive law of Idaho; nor is such an allegation of reliance on an "implied warranty" any allegation of fact. Facts of particular use and reliance upon the skill or judgment of the seller, and that such reliance was made known to seller must first be alleged as jurisdictional to state a claim and such implied warranty.

Moreover, Section 15 of the Uniform Sales Act is merely declaratory of the English Common law which was the substantive law of Idaho prior to the enactment of the Uniform Sales Act and did not change such law. Section 73-116 Idaho Code specifically provides as follows:

> "Common law in force.—The common law of England, so far as it is not repugnant to, or

> inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state."

Under the substantive law of Idaho there is no presumption of superior skill or reliance thereon or knowledge thereof under the circumstances above mentioned; and, clearly, no claim is stated by Appellant upon which any relief can be granted against Appellee.

The trial court, accordingly, sustained a motion to dismiss, and Appellant appeals therefrom.

SECTION 15, UNIFORM SALES ACT (SEC. 64-115 I.C.) IS MERELY DECLARATORY OF THE ENGLISH COMMON LAW

Williston on his work on sales, Vol. 1, p. 583, states that Section 15 of the Uniform Sales Act is clearly a codification of the English Common Law:

> "In regard to no other section of the Statute is it more important to remember that, except as clearly expressed otherwise, a codification of the common law is intended, though not of the previously existing unwritten law of any individual State enacting the Uniform Law. This particular section was taken nearly verbatim from the English Sale of Goods Act, except that it does not adopt the English terminology of 'condition' as distinguished from 'war-

> ranty.' And it has been said on high authority of the section in the English Act, 'The section completely incorporates the common law, and in no way limits its operation.' "

As noted by Mr. Williston, some states deviated from the English Common Law, and their local common law resulted in a somewhat different construction with reference to warranties; however, as heretofore mentioned, in Idaho by statutory provision the common law of England was made the rule of decision in all of our courts.

In many jurisdictions the courts have reiterated that this section is merely declaratory of the common law.

> *Child's Dining Hall Co. v. Swingler*, 1938 197 A. 105, 173 Md. 490;
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> *McNabb v. Central Kentucky Natural Gas Co.*, 1938, 113 S.W. 2d 470, 272 Ky. 112;
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> Hoback v. Coca Cola Bottling Works of Nashville, 1936, 98 S.W. 2d 113, 20 Tenn. App. 280;
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> The St. S. Angelo Toso, C.C.A. Pa. 1921, 271 F. 245;
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> Keenan v. Cherry, 1925, 131 A. 309, 47 R.I. 125;
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> Aetna Chemical Co. v. Spaulding, etc., Co., 1924, 126 A. 582, 98 Vt. 51;
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> Merrill v. Hodson, 1914, 91 A. 533, 88 Conn. 314, Ann. Cas. 1916D, 917, L.R.A. 1915B 481;

Matteson v. Lagace, 1914, 89 A. 713, 36 R.I. 233;

Sampson v. Frank F. Pels Co., 1922, 192 N.Y.S. 538, 199 App. Div 854;

G. B. Shearer Co. v. Kakoulis, 1913, 144 N.Y.S. 1077;

Ward v. Great Atlantic, etc., Tea Co., 1918, 120 N.E. 225, 231 Mass. 90, 5 A.L.R. 242;

Lieberman v. Sheffield-Farms-Slawson-Decker Co., 1921, 191 N.Y.S. 593, 117 Misc. 531;

Simon v. Graham Bakery, 111 A. 2d 884 (N.J. 1955);

Lee v. Cohrt, 232 N.W. 900 (S.D.).

New Jersey adopted the Uniform Sales Act in 1907. The New Jersey Court in 1955 in the case of *Simon v. Graham Bakery*, reported at 111 Atl. 2d 884, specifically held that the Uniform Sales Act provision relating to warranties merely declares and codifies the common law. The New Jersey Court in the case of *Misky v. Childs Company*, 135 Atl. 805, said:

> "The answering Appellant's second contention that the common law has been modified by the Sale of Goods Act, already referred to, we think it clear, not only from the foregoing but from the avowed scope and purpose of that Act, which, in respect to the question here involved, is but declaratory of the common law, that such contention cannot be sustained."

After quoting Section 15(1), the Court further states:

> "This is the language of the cases and was already the rule at common law."

Maryland enacted the Uniform Sales Act in 1910. Appellant's counsel refers to the Maryland case of *Vaccarino v. Cozzubo*, 31 Atl. 2d 316, decided in 1943. This case involved the sale of food for immediate consumption. The item purchased was pork sausage, and the plaintiff became ill with trichinosis. On page 318 of this opinion the Court, after quoting Section 15(1), said:

> "In the case of sale by a retailer for immediate consumption the sales act is declaratory of the common law holding that there is an implied warranty that the food is reasonably fit for the purpose."

The case was reversed for further proceedings to determine whether or not the food had been properly prepared, the Court holding that the warranty was not unlimited and would extend only to food to be eaten when properly cooked and that the seller was not an absolute insurer that the meat when eaten raw or cooked in an unusual or improper manner was wholesome. Counsel also cites the case of *Ward v. Great Atlantic Company*, reported in 1918, 120 N.E. 225.

Mass. had adopted the Uniform Sales Act in 1908. This case involved a pebble found in a can of beans.

The Massachusetts Court in referring to Section 15(1) on p. 226 of the report held:

> "That provision governs the relations of the parties in the case at bar. In this respect the statute is in substance so far as concerns a dealer such as defendant, simply a codification of the common law."

The Court made a distinction between the contents of a can sealed by the packer, and a purchase of goods which could be inspected:

> "The situation is quite different from the choice of a fowl or a piece of meat from a larger stock, all open to inspection, where there is opportunity for the exercise of an independent judgment by both buyer and seller, and where, therefore, the fact as to the one who makes the selection is of significance as in the Farrell case."

Michigan enacted the Uniform Sales Act in 1913. Counsel cites the 1934 case of *Cheli v. Cudahy*, 255 N.W. 414. In this case the plaintiff's wife died from trichinosis from eating uncooked sausage prepared from pork meat bought from a dealer who had been supplied by defendant packing company. After holding that the evidence disclosed no negligence on the part of the defendant in processing the pork, the court discussed whether the defendant could be held on the theory of implied warranty under subdivision (1) of Section 15 and concluded that it could not.

Referring to the language of subdivision (1), the Court said:

> "Tested by this language, the record does not disclose the buyer expressly or by implication made known to the seller that the pork was required for the purpose of making raw sausage to be eaten in an uncooked state, nor is there any showing that an implied warranty or condition as to the quality or fitness of raw pork as food in an uncooked condition is annexed to the sale by usage of the trade. See subdivision (5) of the same statute. Comparatively speaking only an infinitesmal amount of the pork sold is eaten raw. It seems to follow logically that it is unfair to impose the liability of insurer upon the meatpacker through the implication of a warranty that pork is fit for human consumption in a raw state."

In Lee v. Cohrt, 232 N.W. 900, at p. 903, the South Dakota Supreme Court said:

> "We t h i n k two warranties purporting to cover the same subject are bound to be inconsistent unless of the same legal effect. The Uniform Sales Act is not in conflict with the rule announced by the weight of authority prior to its adoption. It simply attempts to make the law uniform in states adopting the act and abolishes the minority rule prevailing in some states excluding all implied warranties where there is a written contract, or where there is an ex-

press warranty concerning any subject, though not the one involved."

In Griffin v. Runyon, 82 S.E. 686, West Va. 1914, page 688, the Court said:

"A mechanical article or instrument made of materials of known strength and duration and fabricated by known workmanship and methods is entirely different. So are vegetable products grown by the seller. These are all inanimate material things, the quality and characteristics of which are susceptible of accurate knowledge."

Barton v. Dowis 285 S.W. 988:

"The warranty in case of sales is collateral to the agreement of the sale. It is in the nature of a covenant against failure of the article for a certain specific purpose or for a certain specific reason. If a manufacturer warrants his machine to do good work of a certain character, that is no warranty that it will do good work of a different character. The implied warranty that the hogs purchased by Plaintiff were fit for breeding purposes was not a warranty that they would not communicate a disease to other hogs. A warrantor is bound only by the terms of his covenant. If the hogs were afflicted with disease which rendered them unfit for breeding purposes, then that Defendant, it may be con-

ceded, would be covered by the implied warranty. That warranty means that they were healthy and capable of procreation, that they would reproduce the kind and variety they were represented to be. There is no evidence to show that the hogs purchased by Plaintiff were not good for breeding purposes—the purpose for which they were bought."

"Where a stallion was purchased for breeding purposes, carrying an implied warranty, the contract did not include a warranty that he was free from a disease which would be transmitted to offspring. Citing cases."

"The implied warranty that the hogs were good for breeding could not, by any stretch, be construed as a covenant to hold Plaintiff harmless from any disease which the purchased hogs might have communicated to his other herd. That this would be covered only by the express warranty pleaded, which the Plaintiff appeared in submitting his case. Under the evidence, the only damage that could have occurred to Plaintiff by reason of the breach of warranty submitted, was the weakness and incapacity of one of the hogs, which Plaintiff claims became of no particular value, and was sold for small price. The judgment is reversed and the case remanded. All concur."

From an analysis of the foregoing cases it is clear that with respect to the matters involved herein the adoption of the Sales Act did not change the rule of

decision under the common law in effect in Idaho. The only effect that the adoption of the act could have upon any state would be to bring the law of those states into line with the generally accepted principles of common law insofar as the previous court decisions of a particular state may have differed from the cases under the English Sale of Goods Act and Common Law. This did not affect the Idaho rule for the reason that the Idaho rule was already in line with the language employed by the statute. Justice Vanderbilt in the Simons case supra, made reference to the scope and purpose of the Uniform Sales Act in showing that with respect to subdivision (1) there was no change in the common law.

As we have previously pointed out, Section 15 clearly states that the rule of caveat emptor shall apply, except in the situations enumerated in subdivision (1) with respect to implied warranty. The cases to which we have referred clearly show that the common law and under the common law as codified by the Sales Act, that there was an implied warranty with respect to food sold for immediate consumption, but that this was not an unlimited warranty, as shown by the cases cited by counsel. *Vaccarino v. Conzzubo*, 31 Atl. 2d 316; *Ward v. Great Atlantic Company*, 120 N.E. 225; *Cheli v. Cudahy*, 225 N.W. 414. These cases, all decided subsequent to the adoption of the Uniform Sales Act, arrive at the same result and employ the same reasoning as those under the common law decisions set forth by the Supreme Court of Idaho in the case of *McMaster*

v. Warner, 44 Ida. 544, 1927, 258 Pac. 547. As we have previously pointed out, the Idaho Court in the McMaster case stated that there is an implied warranty that such warranty is not absolute, but is based on an actual or presumed knowledge by the vendor of fitness of the thing sold for the particular purpose for which it was desired so far as such knowledge is reasonably attainable. We have previously shown that based upon this reasoning and upon public policy, the courts, long before the Sales Act crystalized the rule and the language shown in Section 15, had applied this presumption to sale of food stuffs for immediate consumption. Counsel cites many cases under both of these situations, but such cases are not analogous to the facts in the case at bar.

Not all jurisdictions have adopted the Uniform Sales Act, and those jurisdictions adopting the same did so at different times. Accordingly, in the citation of authorities note should be taken as to whether the decision involved was in a state that has adopted the Uniform Sales Act and whether rendered before or after such adoption and whether the English Common Law had been followed prior to such adoption.

There is no apparent unanimity in the decisions as to the existence of an implied warranty under Section 15 or under the common law, but a careful examination of the cases discloses they can be reconciled by having in mind that there grew up in the evolution of the common law certain instances where the courts were inclined to impute reliance, superior knowledge, skill or a particular purpose from the

facts. Although the word "presumption" is not often used and text writers contend that it is not a presumption, but a rational imputation of knowledge or skill superior in the seller, nevertheless, it can be more readily pointed out by referring to such tendency as a presumption in certain cases of a particular use as opposed to a general use, reliance upon the superior knowledge, skill and judgment of the seller and the knowledge of the seller of such reliance.

No useful purpose can be served by pointing out all of the instances where such presumption or tendency was indulged in by certain courts in favor of or against such imputation of skill and reliance, but for illustration purposes, we shall refer to a few outstanding instances.

In the case of a manufacturer who built the goods at common law, there was generally a presumed superior knowledge of skill of a vendor. *White v. Miller*, 71 N.Y. 118, 131, 27 Am. Rep. 13. This presumption was founded upon the premise that the person manufacturing an article knew what he was doing when he made it.

At common law the same tendency or presumption was indulged in with reference to the grower of seeds. *VanWyck v. Allen*, 68 B.T. 61, 25 A. Rep. 136.

In the case of a breeder of animals, the decisions holding the seller responsible have generally followed the same tendency, but have stressed the particular purpose which was obvious.

In the case of food for immediate consumption, at common law there was a strong tendency or pre-

sumption to hold the seller. In *Williston on Sales*, Vol. 1, p. 633, it is stated:

> "But whatever the basis of the doctrine it was laid down broadly by Blackstone, that 'in contracts for provisions it is always implied that they are wholesome, and if they be not, the same remedy (damages for deceit), may be had.' This statement is frequently repeated and relied on as a ground for decision."
>
> "It is doubtful, however, if it would now generally be held that there is such a warranty (in the absence of special facts showing reliance on the buyer's skill and judgment) unless the seller is a dealer, and importance is also attached to the fact that the buyer is buying for immediate consumption. In such a case the law is clear that a warranty is to be implied that the article sold is fit for human consumption."

It will be noted that the principles involved are not altered. In other words, as expressly provided in the Uniform Sales Act, there must be reliance upon the seller, knowledge in the seller of such reliance, and a special purpose. It is simply that in the evolution of the common law there grew up the imputation of these facts in the case of food for immediate consumption.

It is interesting to note that Appellant in several instances refers to the purchase of the parakeet for consumption as a pet (Br. pp. 2, 31). It maye be that Appellant is endeavoring to bring herself within the

rule with reference to food for immediate consumption. Manifestly, the rule has no applicability here.

As above noted, however, there is no unanimity today as to how far courts will go in such presumption, many states holding that the same allegations of reliance, knowledge and purpose must be made as in other instances. Complete analysis of all the cases and the split in the authorities is set out in Vol. 23, *Minn. Law Review*, pages 585 to 615.

Under the heading of Substantive Law of Idaho, we shall further discuss these various instances and show that the English Common Law was clearly followed by the Courts in Idaho.

At common law such imputation or presumptions were not indulged in where animals were involved. It was necessary to allege and show a particular, as opposed to general, purpose, reliance upon the superior knowledge, skill or judgment of the seller and his knowledge of such reliance.

The cases arising under Section 15(1), Uniform Sales Act and the English Common Law prior thereto, are legion. We shall merely call the Court's attention to some of the cases illustrating the principles involved, which reconcile substantially all of the cases.

To state a claim there must be an allegation of reliance upon Seller's skill or judgment, purchased for a particular purpose and knowledge thereof in the seller.

The St. S. Angelo Toso, C.C.A. Pa. 1921, 271 F. 245;

Dunbar Bros. Co. v. Consolidated Iron-Steel Mfg. Co., C.C.A. Conn. 1928, 23 F. 2d 416;
Keenan v. Cherry, 1925, 131 A. 309, 47 R.I. 125;
Aronowitz v. F. W. Woolworth Co., 1929, 236 N.Y.S. 133, 134 Misc. 272;
Whipple v. Sherman, 1923, 200 N.Y.S. 820, 121 Misc. 14;
Thomson v. Meyercord Co., 1919, 174 N.Y.S. 733;
Bonwit v. Kinlen, 1915, 150 N.Y.S. 966, 165 App. Div. 351;
Wasserstrom v. Cohen, 1915, 150 N.Y.S. 638, 165 App. Div. 171;
Standard Rice. Co. v. P. R. Warren Co., 1928, 159 N.E. 508, 262 Mass. 261;
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Rhodes v. Libby, 1930, 288 P. 207;
Santa Rosa-Vallejo Tanning Co. v. C. Kronauer, 1923, 228 Ill. App. 236;
Davenport Ladder Co. v. Edward Hines Lumber Co., C.C.A. Iowa 1930, 43 F. 2d 63;
Leiter v. Innis, 1912, 138 N.Y.S. 536;
Drumar Mining Co. v. Morris Ravine Mining Co., 1939, 92 P. 2d 424, 33 Cal. App. 2d 492.

As above noted, in the case of animals no presumption of knowledge, skill or reliance was indulged in

at common law, nor under the Uniform Sales Act. Appellant states that she has been unable to find any animal cases excepting the one case, which we shall discuss later, involving the sale of rabbits for immediate consumption where the injury complained of was in the handling of the animal; however, there are a number of cases illustrating the principle announced by the trial court. In other words, it had to be both alleged and proved that there was a special purpose, reliance upon the skill or judgment of the seller and knowledge in the seller. As an illustration, there was no implied warranty that heifers would be adapted to dairy and breeding purposes unless the buyer expressly or impliedly informed the seller that they were purchased for such purposes and relied upon the seller's skill or judgment. *King v. Gaver*, 176 Md. 76, 3 A. 2d 863, 1939. (Md. adopted the Uniform Sales Act June 1, 1910.)

An auction bill making no express statement that the cows offered for sale were sound or the equivalent, gives rise to no warranty of general condition or health. *Maeckel v. Diesenroth*, 1931, 253 Mich. 284, 235 N.W. 157. (Mich. adopted the Uniform Sales Act 1913.)

It is also elementary that where an animal is purchased for a particular purpose, there is no implied warranty for defect not covered thereby. Thus, in *Barton v. Dowis*, 315 Mo. 226, 285 S.W. 988, 51 A.L.R. 496, there was a sale of hogs under an implied warranty that the animals were fit for breeding purposes. The hogs died of the cholera, and the buyer

sued the vendor for damages. A judgment in plaintiff's favor was reversed, the court saying:

> "The implied warranty that the hogs purchased by plaintiff were fit for breeding purposes was not a warranty that they would not communicate a disease to other hogs.
>
> "Where a stallion was purchased for breeding purposes, carrying an implied warranty, the contract did not include a warranty that he was free from a disease which would be transmitted to an offspring.—Briggs v. Hunton, 87 Me. 145, 32 A. 794, 47 Am. St. Rep. 318. See also 24 R.C.L. 202; Johansmeyer v. Kearney, 37 Misc. Rep. 785 (76) N.Y.S. 930.
>
> "The implied warranty that the hogs were good for breeding could not by any stretch be construed as a covenant to hold the plaintiff harmless from any disease which the purchased hogs might have communicated to his other herd."
>
> Judgment affirmed.

It will be noted that in the cases cited by counsel there are a number of jurisdictions that have not adopted the Uniform Sales Act. Clearly the situation is different where, as Appellant states, "a warrant arising from representations made" as in the case of *Woolsey v. Zieglar (Okla.)* 123 P. 164, cited by Appellant. In the Iowa cases of *Peterson v. Dreher*, 194 N.W. 53 and *Trousdal v. Burkhart*, 224, N.W. 93, the principles heretofore discussed by us

were followed, because the buyer stated to the seller he desired to purchase the cow for breeding purposes. Again, the Minnesota case of *Alford v. Kruse*, 235 N.W. 903, cited by Appellant, follows within the breeder of animal cases. The other animal cases cited by Appellant are again in confirmation of the principles hertofore set forth where the purpose was communicated and reliance had upon the seller. Counsel appears to place great reliance upon the Illinois case of *Haut v. Kleene*, 50 N.E. 2d 855 (Ill. 1943). The Plaintiff contends that the Court in this case held that the implied warranty of fitness for human consumption would extend to a case where the damage occurred as a result of handling the diseased animal. Even a cursory reading of the case shows that the Court did not so hold. *Plaintiff's first quotation from the case is a discussion of what was contained in the Complaint and not the holding of the Court.* In the Haut case the retailer Slad had sold some rabbits for human consumption to the Plaintiff Haut. The Plaintiff's wife had an open cut on her hand at the time she was preparing the rabbits for cooking. The rabbits were prepared and eaten by the whole family with no ill effects. About a week later the Plaintiff's wife sickened and died, the doctor stating that it was his opinion that she had contracted tularemia or rabbit fever through the open cut in her hand and that such was the cause of her death. The Appellant Court reversed the cause ostensibly on the ground that the Court had erred in procedural matters in reversing rulings upon various motions of the separate defendants for directed

verdicts. In specific connection with the Plaintiff's claim and requested instruction that the implied warranty covered the handling as well as the consumption as food of the rabbits, the Court actually did not so hold and on page 857 said:

> "The case was submitted to the jury as shown by the instructions on the question of negligence as against the three defendants and on the question of implied warranty as against defendant, Amy Slad, and her counsel contend that the instruction on the implied warranty was improper and prejudicial. By it the jury were told that it is the law in this state that where a retailer sells articles of food for immediate consumption he is a 'warrantor that the articles he sells are wholesome and free from defects that may injure the health of the person for whom they are purchased' and if they find that Amy Slad sold the rabbits for immediate consumption that were 'diseased or infected with anything unwholesome, and which rendered it unwholesome as food and which could not be perceived by the plaintiff or his intestate and that by reason of such defect, Estelle Haut was made ill' and died as a result, and if the jury found she and her next of kin were in the exercise of ordinary care for her own safety, then the law required defendant to compensate plaintiff.
>
> "Counsel for defendant Slad contend this instruction was erroneous and unwarranted for

the reason that it is undisputed that the rabbits were cooked and eaten with no ill effects which showed they were good food and there was nothing in the instruction which referred to the question of the handling of the rabbits as plaintiff had alleged in his amended complaint. *In view of the state of the record, which we have above set forth, we think the instruction might tend to confuse the jury. But in any event, we are of opinion that the issue can be submitted as against the defendant Amy Slad without any confusion.*

"Counsel for defendant Slad say that the decided weight of authority in the United States holds that there is an implied warranty that m e a t s sold for immediate consumption are wholesome and that this implied warranty cannot be extended to the handling and preparation of meats."

The Illinois Court, having reversed the case on the procedural matter, then went on to hold that any implied warranty as to fitness for human consumption would extend to the Plaintiff's wife rather than having failed because of lack of privity of contract between the purchaser of the food and the injured person. But as clearly shown by the foregoing quotation, the court did not hold that implied warranty for fitness for human consumption covered injury sustained by means other than actual consumption of the animals as food. And in fact, the evidence of

the case clearly showed that the injury was not the result of consumption as food.

Further, the evidence in the Haut case showed that the Defendant, Mrs. Slad, had made an express warranty that the rabbits were good fresh rabbits. The report on page 856 of said opinion states: "He testified that he asked Mrs. Slad if they were good fresh rabbits and she said they were."

It follows that this case can be cited only for the proposition that in Illinois, the court cannot under the conditions set forth, reserve rulings on a motion for directed verdict and that an implied warranty of fitness for human consumption of food stuffs extends to the family of the purchaser. Neither of these matters is an issue under the pleadings in this case.

Appellant stresses the circumstances of the sale. This, of course, was the basis of the tendency or imputation or presumption raised at common law in certain instances, as hereinbefore discussed. Animals were never included in such instances; however, there is no allegation of fact in this case setting forth any special circumstances. As a matter of fact, the bare allegations negative the requirements of the statute.

In *Miller Lumber Co. v. Holden*, 1954, 273 P. 2d 786 (Wash.) (adopted Uniform Sales Act 1926) where there was a sale of rough Alder lumber, and both parties were unfamiliar with Alder lumber, there was no implied warranty.

Another illustration is *Wasserstrom v. Cohn*, 150 N.Y.S. 638 (adopted Uniform Sales Act 1911) where a reliance was declared to have been had on the skill and knowledge of the plaintiff's salesman, the court held that as between the salesman and the purchaser, the parties stood in at least an equal position.

In *Lindsey v. Stalder*, 208 P. 2d (Colo.) 83 (adopted U.S.A. 1942), where a certain type of wood was ordered and the buyer knew that the seller had no particular experience in such wood, there was no presumption of any superior skill or knowledge.

Probably the best illustration of so-called circumstances with reference to the raising of a presumption or imputation of reliance and particular purpose, is the case of Torpey v. Red Owl Stores (Minn.), 1955, 129 F. Supp. 404 (Minn. adopted Uniform Sales Act 1917). In the light of the historical decisions at common law with reference to food for immediate consumption, the case is interesting as to the circumstances from which reliance and knowledge of purpose may be imputed. In other words, conditions have changed. In the super market and other institutions carrying on business in a similar manner the salesman or saleswoman handles the goods. The super market or the five and dime stores are retailers. There must be some rational basis for any presumption. The Court said:

> "This question of reliance is raised, of course, whenever one seeks to hold liable a mere retail dealer for injuries caused by latent defects in

an article which the dealer cannot reasonably be expected to discover. *It has very persuasively been argued that the reliance necessary to a finding of an implied warranty is not reasonably found in such a situation, and that the retailer in such circumstances should not be responsible.* See Waite, Retail Responsibility—A reply, 23 Minn. L. Rev. 612 (1939). Accordingly, numerous courts have held that the warranty does not apply to retail dealers as to latent defects. E. g., Scruggins v. Jones, 1925, 207 Ky. 636, 269 S.W. 743; Kroger Grocery Co. v. Lewelling, 1933, 165 Miss. 71, 145 So. 726; Aronowitz v. F. W. Woolworth Co., 1929, 134 Misc. 272, 236 N.Y.S. 133; United States Fidelity & Guaranty Co. v. Western Iron Stores Co., 1928, 196 Wis. 339, 220 N.W. 192, 59 A.L.R. 1232; See Prosser, Torts 671 and cases cited n. 32. Indeed, in what sense can the consumer be said to rely upon the retail dealer as to the freedom from hidden defects of the many products he sells? *No reasonable person today assumes that the supermarket operator knows anything more about the hidden contents of goods in sealed containers than the consumer knows himself. Surely he does not believe that the operator could do more than make a cursory inspection of the article. Certainly the purchaser in the case at bar did not expect the defendant to make a microscopic examination of the walls of the jar to determine their resist-*

ance to stress. If she relied upon the judgment of the defendant at all, she could not have relied to a greater extent than to expect him to choose reputable suppliers, and to offer goods which a reasonable inspection showed to be safe.

"It seems to be conceded even by the proponents of a theory of strict liability upon retail dealers that 'only by some violent pounding and twisting' can the requisite reliance be found in cases like the present. See Prosser, Torts 692 (1941); Brown, The Liability of Retail Dealers for Defective Food Products, 23 Minn. L. Rev. 585 (1939). Nevertheless it is argued that 'public policy' demands the imposition of strict liability. However, the cases previously cited register disagreement with such an interpretation of the public policy, and for reasons to be set out subsequently, this court is not disposed to engage in the necessary pounding and twisting."

SUBSTANTIVE LAW OF IDAHO UNCHANGED BY UNIFORM SALES ACT, SEC. 15 (SEC. 64-115 IDAHO CODE)

As heretofore noted, caveat emptor was the rule at English Common Law with certain exceptions. This rule, together with the exceptions, was codified by Section 15 of the Uniform Sales Act, which expressly provided that there was no implied warranty or condition as to quality or fitness for any particular purpose, excepting as specifically provided in

this section. As heretofore pointed out, the English Common Law was by statute made the rule of decision in Idaho. The substantive law of Idaho, therefore, was unchanged and such rule was codified by Section 15.

Appellant complains that the trial court overlooked the paragraph following the reference to American Jurisprudence, which paragraph specifically states that there is an implied warranty where the seller knows that the animal is being bought for a particular purpose and relies upon the seller's skill or judgment that the animal is fit for that purpose. It was proper for the court not to refer to this paragraph because it is not involved in any of the issues of this case. Appellant did not allege that he relied upon the skill or judgment of the seller, that he was purchasing the parakeet for any particular purpose, or that the seller had knowledge of such reliance or sale for such purpose. There is no allegation that the sale was by description, sample or any particular purpose as opposed to a general purpose. It will be noted that in all of the animal cases whether at common law or under the Uniform Sales Act, there must be a special purpose and reliance upon the skill or judgment of the seller as to such purpose. In these cases the particular purpose was either for breeding or some other special purpose.

As illustrated by the auction case, *Maeckel v. Diesenroth*, 1931, 253 Mich. 284, 235 N.W. 157, supra, the auction bill made no statement that the cows were sound or the equivalent.

The Court said:

> "As there was no express statement in the bill that the cows were sound or the equivalent, there was no warranty of general condition or health. 24 R.C.L. 202; 35 Cyc. p. 388; Puls v. Hornbeck, 240 Okl. 288, 103 P. 665, 138 Am. St. Rep. 883, 29 L.R.A. (N.S.) 202."

However, the auction bill did state the stage of milk production of some of the cows, and the Court then said:

> "In offering them for such particular purpose, the seller was impliedly charged with notice that a purchaser, who should rely upon the offer and declare no other specific object, would buy them for use as milk cows, so the sale carried the implied warranty that they were reasonably fit for that purpose."

We should call the Court's attention to the fact that that case was decided in 1931, and that Michigan had adopted the Uniform Sales Act in 1913. Whether in the sale of a cow or a parakeet, in the absence of knowledge of the seller of a particular purpose, the exception in Sec. 15 does not apply. The ordinary use of a parakeet is simply in a cage or, as alleged by Appellant, as a pet. A particular use would be for the purpose of breeding, trained animal act, laboratory use, or other special purpose. As pointed out in the illustrated cases heretofore cited a "five and dime store" either is neither a breeder

of birds, nor the occupation so special as to create imputation of superior skill or judgment, as in the special instances heretofore cited.

The Supreme Court of Idaho has always followed the rule of decision of the English Common Law. We shall illustrate briefly by the cases so decided that Section 15 (Section 64-115(1), Idaho Code), merely codify such law.

In the case of *McMaster v. Warner*, 44 Ida. 544, 1927, 258 Pac. 547, the heifer involved was infected with germs of a disease called actinomycosis. These germs set up an infection known as the ray fungus and is communicable. The disease sets up an abrasion known as lump jaw. The Court held there was no implied warranty. The Court quoted with approval the following quotation:

> "The rule (of implied warranty) must be held to have a rational foundation, and to be not of a purely arbitrary character."

Appellant (Br. p. 12) argues that the animal did not develop the defect until many months after the purchase. The fact is, it was not visible until the lump appeared. On the other hand, the parakeet was not discovered to have had psittacosis until many months after purchase. Appellant likewise argues that the heifer was purchased upon personal inspection by the buyer. That is also true in the case at bar, neither could the psittacosis nor the actinomycosis be discovered by such inspection by either party. Appellant further argues that the heifer was not to

sold to be used by human consumption. That is also true in the case at bar with the parakeet.

Appellant argues that the statements in the case are dicta. Under the facts of the case, the statements are certainly not dicta, but even if they were, they would be *considered dicta* under the rule well stated in the case of *Yoder v. Nu-Enamel Corporation*, 117 F. 2d 488. The Court of Appeals, 8th Circuit, declared that:

> "In the application of a state statute, the federal courts are, of course, bound by the construction made by the courts of the State. Senn v. Tile Layers Union, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. And the obligation to accept local interpretation extends not merely to definitive decisions, *but to considered dicta as well.* Hawks v. Hamill, 288 U.S. 52, 53 S. Ct. 240, 77 L. Ed. 610; Badger v. Hoidale, 8 Cir., 88 F. 2d 208, 109 A.L.R. 798. Indeed, under the implications of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, and West v. American Telephone and Telegraph Co., 61 S. Ct. 179, 85 L. Ed. , where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. *The responsibility of the fed-*

eral courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed.

"But the answer to the question is to be resolved, not by logical impulse or from outside authority, if there exist any convincing, indicative utterances on the part of the Supreme Court of (the state) . . ." (Emphasis added.)

Appellant then argues that the rule was modified in the case of *Koser v. Hornbeck*, 75 Ida. 24, 265 P. 2d 988. This is a case where a horse was hired and the rider injured. It was a case of bailment and not sale; however, the Court used the word implied warranty, but the Court expressly held that thereunder "*the plaintiff must prove that the keeper had some knowledge, or the facts are such as to charge him with knowledge, of the unsuitability of the animal."

In the case of Grisinger v. Hubbard, 21 Ida. 469, 122 Pac. 853, 1912, there was involved one of the exceptions hertofore mentioned at common law of a nurseryman selling trees for orchard purposes. The court followed the common law rule of a particular purpose and reliance upon the seller's skill or judgment and indulged in a presumption because of the nature of the business. The Court said:

"There can be no question, we think, but that a nurseryman growing young fruit trees for the purpose of sale to persons desiring to cultivate a commercial fruit orchard with a view of raising fruit for commercial purposes, is presumed to have produced such young fruit trees for the purpose of developing into commercial trees; that is, trees that will produce fruit suitable for commercial purposes, and that in selling such trees for that purpose the nurseryman intends that they shall be suitable and adapted to the purpose for which they are sold and of the kind and quality which fulfills the purpose for which they were originally produced; * * *"

Again, for illustration, the case of Barnett v. Hagen, 18 Ida. 104, 108 Pac. 743, 1910, involved the purchase of a burglar proof and fire proof safe. Here again there was a particular purpose made known to the seller and reliance upon the seller's skill or judgment. The Court said:

"By the contract the defendants agreed to purchase a No. 8 F. & B. Victor safe, and the plaintiff in describing such safe told the defendants that it was a burglar and fire proof safe. This amounted to an implied warranty that the safe purchased was a fire and burglar proof safe as such term is usually applied, and that the safe was suitable for the purpose for which it was purchased. (Hunter v. Porter, 10 Ida. 72, 77 Pac. 434; Huntington v. Lombard, 22 Wash.

202 60 Pac. 414; Lander v. Sheehan, 32 Mont. 25, 79 Pac. 408; 13 Am. & Eng. Ency. of Law, 135; Benjamin on Sales, Sec. 661; Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86.)"

Another case that involved the purchase of seed, one of the illustrations that we used in connection with the common law, was *Tomita v. Johnson*, 49 Ida. 643, 290 Pac. 395. This Court said:

> "Where one desiring seed makes known to a dealer his needs for planting, and a selection of seed is made upon recommendation by the seller, there arises an implied warranty that the seed is suitable for the purposes intended. Wapato Fruit & Cold Storage Co. v. Denham, 126 Wash. 676, 219, Pac. 30."

Counsel makes reference to confusion existing in the Idaho law under implied warranties. Our research fails to reveal any confusion. As shown by the foregoing Idaho cases, there is no confusion existing with respect to implied warranties in the holdings of the Idaho Court, either before or after Idaho's adoption of the Uniform Sales Act, and as previously pointed out, the Idaho Supreme Court in the McMaster case had already established the rule adopted by the language of Section 15(1) of the Sales Act herein. We believe this to be an analogous situation to that found in the Idaho case of *Sanger v. Luken*, 26 Fed. 2d 855. The Federal Court there had under

consideration an Idaho statute which had been amended, and in holding that the former Idaho decisions bound the Court, said in its opinion:

> "Under familiar principles we are bound by this construction of the Act of 1925, and admittedly the amendatory Act of 1927, contains no language enlarging its scope."

In the case under consideration, the Federal Court in determining what the Idaho law herein is is bound by the reasoning of the McMaster case since admittedly the Uniform Sales Act does not enlarge the scope or change the language of the rule laid down by the Idaho Court in that case.

We find these cases as illustrative of the fact that the Supreme Court of Idaho has followed the statutory requirement that the English Common Law is the rule of decision in Idaho. The principles involved are identical with those codified by Section 15. As a matter of fact, although the sale in the case of McMaster v. Warner, supra, was made some months before the effective date of the Uniform Sales Act in Idaho, the case was not decided until some seven years later. Accordingly, the substantive law of Idaho has at all times been and now is as codified by the Uniform Sales Act.

APPELLANT STATES NO CLAIM AGAINST APPELLEE UPON WHICH ANY RELIEF CAN BE GRANTED

As heretofore noted, under the substantive law of Idaho the rule of caveat emptor applies unless a claimant brings himself under certain exceptions, which rule was codified by Section 15 Uniform Sales Act (Sec. 64-115 I.C.) by first stating that no implied warranties exist excepting in certain instances which are identical to those at the English Common Law; and that the state of Idaho specifically provided by statute that the English Common Law is the rule of decision in Idaho. Appellant in her brief contends that she comes within the exception of the rule of caveat emptor in that she purchased a parakeet for a specific purpose, made known such purpose to the seller, and that she relied upon the skill and judgment of the seller, however, the complaint raises no such issue. It was, therefore, not necessary for the Court to discuss such exception to the general rule of caveat emptor.

There is no allegation of any purchase for a particular or specific purpose as opposed to a general purpose. There is no allegation that Appellant relied upon the skill or judgment of seller or that seller knew of such reliance. Appellant apparently endeavors to rely upon some presumption of knowledge, particular purpose and reliance; hence the reference to food cases—food for immediate human consumption, even to the point of stating that the

use of an animal in the ordinary way was "consumption."

As heretofore pointed out, the tendency to impute or presume facts in certain instances at common law were not only restricted to cases such as manufacturers, breeders and food, but no such imputation or presumption was ever indulged in insofar as animals were concerned—nor has Appellant found any such case. In the cases we have cited and in all of the texts, the general rule of caveat emptor applies in the case of animals, and only where there was a specific or particular purpose, the seller is a breeder and specially in the business for a certain purpose, would the Court find knowledge or reliance under proper allegations.

It will also be noted in the cases hereinbefore mentioned that the particular purpose in the statute, as well as at the English Comon Law, must be a specific purpose. Manifestly, the ordinary use would not be a specific purpose. In the purchase of a bird the ordinary or general use would be to have the bird about the house in a cage of other enclosure. This is referred to by Appellant as a companion or pet (Br. p. 2, 31). An analogous case would be the purchase of a dog. The general purpose would be to have him near the house in a dog house or in the house generally, again as a companion or pet. Courts, however, have held that the specific purpose would be that of a breeder or trainer where the dog was purchased for either breeding purpose, hunting or other special purpose. So, likewise, as pointed out in the case of a cow, unless it was purchased for

breeding, milking or other special purpose, there was no implied warranty.

The only fact alleged is that Appellant purchased a parakeet from Newberrys, referred to by Appellant as a "five and ten cent store" (Br. p. 31), which had been offered to the general public. There is no allegation and could not be any allegation that Newberry was in the bird business or was the breeder of birds, or was selling the same for any special purpose, such as breeding, talking birds, trained animals, laboratory use, or any of the many special purposes for which a parakeet could be used. As was stated in the case of *Torpey v. Red Owl Stores*, *supra*, no reasonable person today could assume that in a five and ten cent store the clerk would know anything more about hidden defects than the purchaser himself. Surely the sales person could make no more of an inspection than the purchaser. As said in the case above mentioned, certainly the purchaser could not expect the sales person to make a microscopic examination. Neither in the case of the lump jaw, *McMaster v. Warner*, *supra*, where there was alleged that germs existed at the time of the sale nor in the case of the parakeet here involved where it is contended that psittacosis or parrot fever germs existed at the time of the sale, was such existence discovered until several months later, and the same could not have been discovered at the time of the sale, excepting by microscopic, pathological laboratory tests.

There is no allegation that the parakeet, at any time, exhibited any evidence of diseased condition

or did not get well. There is no allegation that Newberrys was a pet store or a breeder of birds. In fact, the allegations negative such facts by merely alleging that the so-called five and ten cent store offered parakeets to the public generally at its store. There is no allegation bringing Appellant within the exceptions to the rule of caveat emptor, either at common law or under the Uniform Sales Act by imputation from facts, such as the seller being a nurseryman, a seller of seeds, a grower, specialty business, manufacturer, or other illustrations heretofore noted. In fact, there is not even an allegation of fact of reliance upon the seller's skill or judgment.

Appellant's statement in her brief that the parakeet was for "consumption" apparently is an effort to bring her within one of the special presumptions or imputations of knowledge and reliance as in the case of food for immediate consumption, which certainly is negatived by the allegation of consumption as a pet; however, as hereinbefore pointed out, even in the food cases the imputation or presumption of knowledge and reliance upon skill or judgment has been discarded by many jurisdictions, including those adopting the Uniform Sales Act because of no rational basis under present conditions where purchases are made at supermarkets, five and ten cent stores and similar businesses. As said by Williston on his work on Sales, Vol. 1, p. 610, "His (seller) occupation is, however, important evidence of the justifiableness of the buyer's reliance." In other words, this is the basis of the imputation or presumptions indulged in in certain instances at common law

in cases such as manufacturer, breeder, nurseryman, etc. As heretofore pointed out, Appellant makes no allegation of reliance upon seller's superior skill, knowledge or judgment, but merely that Appellant relied upon an implied warranty, which is not an allegation of fact, nor an allegation of the facts required to bring Appellant within the exception of reliance upon the skill or judgment of seller. Moreover, Appellant could make no such allegation, and if she did, she could not prove it because it would be unreasonable to assume that a sales person in a five and ten cent store could have any knowledge or would have any superior skill or judgment. There being neither allegation nor any rational basis to bring Appellant under the exception, Appellant clearly came within the rule of caveat emptor, and the order of the trial Court should be sustained.

Respectfully submitted,

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T. H. Eberle
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